No. 97-794 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Supreme Court, U.S.
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CONSOLIDATED EDISON COMPANY OF NEW YORK, *et al.*,

Petitioners,

v.

FEDERICO PENA, SECRETARY OF ENERGY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR THE STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND AND WEST VIRGINIA, THE TERRITORY OF GUAM AND THE VIRGIN ISLANDS

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QUESTION PRESENTED

Whether third-party claimants to crude oil overcharge refunds recovered by the Department of Energy under Section 209 of the Economic Stabilization Act may collaterally attack DOE's distribution of those refunds pursuant to a 1986 court approved settlement agreement.

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BRIEF IN OPPOSITION

The States of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island and West Virginia, the Territory of Guam and the Virgin Islands respectfully submit that the petition for a writ of certiorari of Consolidated Edison Company of New York, *et al.* ("Petitioners") should be denied. The decision of the Court of Appeals is correct and there are no special or important reasons to grant certiorari.

STATEMENT OF THE CASE

A. Factual Background

In 1970 and 1973, respectively, Congress enacted the Economic Stabilization Act ("ESA"), Pub. L. No. 91-379, 84 Stat. 799 (1970), as amended, Pub. L. No. 92-210, 85 Stat. 743

(1971) [last codified at 12 U.S.C. § 1904 note (1976)], and the Emergency Petroleum Allocation Act, Pub. L. No. 93-159, 87 Stat. 27 (1973), authorizing the President, *inter alia*, to impose allocation and price controls with respect to the sale of crude oil and refined petroleum products. Pursuant to that authority, the Department of Energy's predecessor agencies (collectively with the Department of Energy, "DOE") adopted regulations controlling the price of crude oil. *See, e.g.*, 39 Fed. Reg. 1925 (Jan. 15, 1974). DOE subsequently filed hundreds of administrative and judicial enforcement actions for violations of those regulations. The judicial actions were brought pursuant to Section 209 of the ESA, which authorized DOE to recover monies collected in violation of its price control regulations ("overcharges"). *See* Pet. App. 34a (ESA § 209).

In addition to such government actions under Section 209, Section 210 authorized overcharged private claimants to file suit in federal court to recover their overcharges directly. *See* Pet. App. 34a-36a (ESA § 210).

Major disputes arose among the federal and state governments, crude oil refiners, and major industrial, commercial, utility and agricultural users of petroleum products with respect to the appropriate ultimate distribution of overcharges recovered and to be recovered by DOE. *See In re Dep't of Energy Stripper Well Exemption Litigation* ("*M.D.L. No. 378*"), 653 F. Supp. 108, 112-14 (D. Kan. 1986).

M.D.L. No. 378, one of DOE's most significant cases, was settled in 1986. That settlement was the culmination of more than eight years of extensive multidistrict litigation and settlement negotiations, and was entered into by the United States, 56 States and Territories ("56 Jurisdictions"), hundreds of oil companies and hundreds of large industrial, commercial, utility and agricultural claimants to the recovered overcharge funds. *M.D.L. No. 378*, 653 F. Supp. at 109, 112.

The *M.D.L. No. 378* global settlement established the formula for distributing all crude oil overcharges recovered by DOE, in both *M.D.L. No. 378* and all other judicial and administrative proceedings, and has governed the distribution of almost $5 billion in hundreds of overcharge cases. *M.D.L. No. 378* Final Settlement Agreement ("FSA") §§ II.B (App. 18a-33a), IV.A (App. 41a-42a), IV.B.2 (App. 43a-45a), IV.B.6 (App. 46a-47a), approved in *M.D.L. No. 378*, 653 F. Supp. at 112-14.

The FSA provided for the payment of specified sums from the *M.D.L. No. 378* escrow account to third-party claimants. The balance of the *M.D.L. No. 378* escrow account, certain funds then held in escrow by DOE and all future funds recovered in *M.D.L. No. 378* were to be divided equally between the 56 Jurisdictions and the federal government. FSA § II.B.3 (App. 27a-33a); *see also M.D.L. No. 378*, 653 F. Supp. at 112.

The FSA further provided, with respect to all other crude oil overcharges, that a maximum of 20% of future recovered funds would be reserved for the payment of claims by injured third-party claimants, upon proof of purchase, and that the remainder would be distributed equally between the 56 Jurisdictions and the federal government. FSA § IV.B.6 (App. 46a-47a); *M.D.L. No. 378*, 653 F. Supp. at 114.

This agreed formula, which became known as the 40-40-20 formula, was based on estimates, in which Petitioners' counsel concurred, that the "total amount distributed to end-users will probably not exceed 15%." *Getty Oil Co. v. DOE*, 117 F.R.D. 540, 550 (D. Del. 1987), *aff'd*, 865 F.2d 270 (Temp. Emer. Ct. App. 1988); Appellants' Initial Brief in Fed. Cir. at 16. The agreed formula was formally adopted by DOE in its Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 Fed. Reg. 27,899 (Aug. 4, 1986) (App. 57a-70a), and implemented in DOE's Implementation of

Special Refund Procedures, 52 Fed. Reg. 11,737 (Apr. 10, 1987) (App. 71a-99a); *In re Dep't of Energy Stripper Well Exemption Litigation, M.D.L. No. 378*, 857 F.2d 1481, 1483 (Temp. Emer. Ct. App. 1988).

The distributions to third-party claimants were to be calculated on a volumetric basis in proportion to the number of gallons of petroleum products purchased. Neither the ultimate gallonage of petroleum product claims, nor the ultimate amount of overcharge funds to be collected, was or could be known until the submission of all claims and the completion of all proceedings. Thus, DOE faced the choice of periodically and timely distributing recovered overcharges based on estimates, or withholding payments indefinitely. DOE chose to make periodic distributions.

Neither the FSA 40-40-20 formula -- which simply capped the maximum percentage available for distribution to private claimants at 20% -- nor DOE's initial determination of a volumetric refund amount created any right to ultimate recovery of any specific dollar amount of money or to future distributions of a like volumetric amount. *M.D.L. No. 378*, 857 F.2d at 1484 ("All that [DOE's] formula affects is the amount that individual end users will receive in refunds out of the 20 per cent set aside to settle their claims."); *see also* Implementation of Special Refund Procedures, 52 Fed. Reg. at 11,739 (App. 80a) ("the settlement permits only downward adjustment of the reserve from the initial 20 percent figure").

Petitioners' current challenge to the FSA 40-40-20 formula is the most recent in a long line of attempts to expand their share of DOE's Section 209 recoveries. Each such challenge has been rejected by the courts. *See, e.g.*, *Consolidated Edison Co. v. O'Leary*, No. 97-1242, 1997 WL 763045 (Fed. Cir. Dec. 12, 1997); *Consolidated Edison Co. v. Herrington*, 752 F. Supp. 1082 (D.D.C. 1990), *aff'd sub nom. Consolidated Edison Co. v. Watkins*, 927 F.2d 1227 (Temp.

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Petitioners' current challenge is also likely to be their last. DOE's authority to control prices was terminated in 1991. Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 28, 1981). DOE's authority to recover overcharges was repealed in 1986, 15 U.S.C. § 4504(a), effective the later of September 30, 1988 or six years after an alleged violation. Thus, no further enforcement actions may be filed. Although a few small administrative proceedings remain open, the issues presented by the petition are unlikely to come before this or any other court at any other time or in any other context.

B. The Proceedings Below

On April 12, 1995, Petitioners filed a three count complaint in the United States District Court for the District of Columbia. Civil Action No. 95 CV-0698. Count I of the complaint sought a declaratory judgment that the allocation of a maximum of 20% of oil overcharge recoveries to private claimants is unlawful. In alternative Counts II and III, Petitioners sought a declaration that overcharge payments to "late-filing" claimants and/or to certain governmental agencies should be excluded from the 20% allocation.

On February 7, 1996, Petitioners filed a second complaint, Civil Action No. 96 CV-00225, seeking to enjoin DOE's scheduled distribution of oil overcharge recoveries obtained from Occidental Petroleum Corporation pursuant to the FSA 40-40-20 formula. The complaint sought to compel distribution of the total overcharges recovered to private claimants rather than to the 56 Jurisdictions or the federal government in accordance with the 40-40-20 formula.

On February 29, 1996, Judge Harold H. Greene denied Petitioners' request for a preliminary injunction and dismissed both complaints for lack of standing to challenge DOE's distribution of oil overcharge funds recovered through Section 209 of the ESA. Pet. App. 25a-30a.

On June 19, 1997, the United States Court of Appeals for the Federal Circuit affirmed the District Court's dismissal of Petitioners' complaints. Pet. App. 1a-22a. The Court held that the complaints failed to state a claim because Petitioners' exclusive remedy was to file private actions for recovery of overcharges pursuant to Section 210 of the ESA and that, therefore, no jurisdictional basis existed for any suit against DOE. Moreover, it found Petitioners' attack on DOE's 40-40-20 allocation of recoveries pursuant to the FSA to be an impermissible challenge to the FSA.

REASONS FOR DENYING THE PETITION

THE FEDERAL CIRCUIT'S DECISION IS CORRECT AND REJECTION OF PETITIONERS' CHALLENGE TO THE 40-40-20 FORMULA RAISES NO SUBSTANTIAL ISSUE FOR REVIEW

The Federal Circuit was correct in holding that Petitioners have no cause of action against DOE, and that Petitioners' challenge of DOE's distribution of recoveries as agreed in the FSA is an impermissible attack on the FSA. Pet. App. 21a. The courts have repeatedly rebuffed the attempts of private parties to interfere with decisions made by DOE in Section 209 enforcement proceedings, including several filed by Petitioners. There is nothing new or novel in Petitioners' current complaint, which at bottom is a collateral attack on "a settlement agreement of historic proportions," *M.D.L. No. 378,* 653 F. Supp. at 109.

ESA Section 209 provides for government enforcement of public rights; it does not provide for the redress of private

injuries. Section 209 does not confer standing on a third-party claimant to challenge a DOE Section 209 recovery action, the settlement of such action or the allocation of proceeds therefrom. ESA Section 210 provides the exclusive private remedy for injuries stemming from oil overcharges. Precedent (often involving Petitioners) has conclusively established that there is no private party standing to challenge any facet of a DOE Section 209 recovery action. *See, e.g.*, *Consolidated Edison Co. v. O'Leary*, 1997 WL 763045, at *3-*5; *Payne 22, Inc. v. United States*, 762 F.2d 91, 93-94 (Temp. Emer. Ct. App. 1985); *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980); *Consolidated Edison Co. v. Herrington*, 752 F. Supp. at 1086-87; *Consolidated Edison Co. v. Breznay*, 683 F. Supp. at 835; *Getty Oil Co. v. DOE*, 117 F.R.D. at 547-50.

To allow Petitioners, private third-party claimants, to upset a government agency's recovery under Section 209 "'would simply create chaos . . . [t]he plaintiffs would gain nothing—the public would gain nothing and everyone would lose.'" *Payne 22, Inc. v. United States*, 762 F.2d at 94 (citation omitted). It is for that reason that the Federal Circuit has confirmed, in a very recent case involving Petitioners, that

> [t]he statutory scheme creates a clear distinction between the public enforcement mechanisms of section 209 and section 503, and the private rights created under section 210. Enforcement of [Emergency Petroleum Allocation Act] regulations under section 209 through remedial orders "is the exclusive right of the government," . . . . Conversely, the private cause of action under section 210 of the ESA "is the exclusive remedy for private litigants."

Consolidated Edison Co. v. O'Leary, 1997 WL 763045, at *3 (citations omitted).

To the extent Petitioners rely on Section 211 for a cause of action *(see* Petition at 10, 14), they are singularly misguided. *Consolidated Edison Co. v. O'Leary*, 1997 WL 763045, at *6, correctly holds that Section 211 "does not create a cause of action not otherwise provided for. Instead, . . . section 211 simply confers jurisdiction on federal district courts to hear cases or controversies arising under the ESA, i.e., cases for which a cause of action is elsewhere provided."

Finally, DOE's implementation of the FSA did not establish for Petitioners an entitlement to any specific sum of money. It merely allocated a maximum of 20% of overcharge recoveries from which Petitioners may seek a proportionate refund. The fact that Petitioners are now dissatisfied with the 20% cap, as the Federal Circuit found below, provides no justification for reopening the eleven-year-old, judicially approved FSA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

January 12, 1998

Respectfully submitted,

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